STATE OF MICHIGAN

COURT OF APPEALS

GREGORY PARSONS,

Plaintiff-Appellant,

v

HMTC, INC.,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 265863
Oakland Circuit Court
LC No. 2004-062996-NO

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant in this slip and fall case. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's first issue on appeal is whether a genuine issue of material fact exists regarding whether the ice upon which he fell was open and obvious. On appeal, a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

In general, a premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). As part of that duty, a premises owner is not required to protect an invitee from, or warn an invitee about, the risks of open and obvious dangers. *Lugo, supra* at 516-517. "The test to determine if a danger is open

and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, the Court should look at whether a reasonable person in the plaintiff's position would foresee the danger. *Joyce, supra* at 238-239.

The availability of the open and obvious defense in a snow and ice case was recently discussed by the Michigan Supreme Court in *Kenny v Kaatz Funeral Home, Inc (Kenny II)*, 472 Mich 929, 929; 697 NW2d 526 (2005), in which the Supreme Court reversed the earlier decision of the Court of Appeals "for the reasons stated in the dissenting opinion." In *Kenny v Kaatz Funeral Home, Inc (Kenny I)*, 264 Mich App 99, 101-102; 689 NW2d 737 (2004), rev'd *Kenny II, supra* at 929, the plaintiff, a lifelong Michigan resident, observed a dusting of snow in a parking lot, but she did not see the ice underneath the snow. The plaintiff also observed three people holding onto a vehicle for balance in the parking lot. Based on that evidence, the dissenting judge in *Kenny I* found the danger posed by the ice to be open and obvious. *Kenny I, supra* at 118-120. In so holding, the dissenting judge in *Kenny I*, noted that the plaintiff had observed others hanging onto cars for support and stated, "That alone should have clued her into the possible danger that awaited her outside the vehicle." *Kenny I, supra* at 119. The dissenting judge in *Kenny I* also observed that the plaintiff in that case had "conceded that it had been snowing outside" and "[a]s a lifelong resident of Michigan, she should have been aware that ice frequently forms beneath snow during snowy December nights." *Kenny I, supra* at 119.

Pursuant to *Kenny II*, our Supreme Court has twice reversed decisions made by this Court before *Kenny II*. In *D'Agostini v Clinton Grove Condominium Association (D'Agostini II)*, 474 Mich 876; 704 NW2d 76 (2005), our Supreme Court, in lieu of granting leave to appeal, reversed this Court's decision in *D'Agostini v Clinton Grove Condominium Association (D'Agostini I)*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2005 (Docket No. 250896), rev'd *D'Agostini, supra* at 876, for the reasons stated in the dissenting opinion in that case. While the majority opinion in this Court had held that snow-covered ice is not per se open and obvious as a matter of law, the dissenting judge found it to be open and obvious in that case because the plaintiff, who had twice traversed the area where he fell, actually knew of the danger of the snow and ice. *D'Agostini I, supra*.

In *Morgan v Laroy (Morgan II)*, 474 Mich 917; 705 NW2d 685 (2005), our Supreme Court reversed this Court's decision in *Morgan v Laroy (Morgan I)*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2005 (Docket No. 253789), rev'd *Morgan, supra* at 917, for the reasons stated by the trial court. While the trial court's reasoning is unavailable, this Court reversed the trial court because the plaintiff only observed snow and had no reason to believe that there was slippery ice beneath the snow. This Court also stated that the "trial court's pronouncements on temperature fluctuations and a general knowledge in Michigan that 'where there is snow, there is ice' typify the general conclusions" rejected in Michigan case law. In this Court's view, were it to hold otherwise, all accumulations of snow and ice would be open and obvious per se. *Morgan I, supra*.

We conclude that the snow-covered ice in this case was open and obvious as a matter of law. Plaintiff was a lifelong resident of Michigan who is familiar with Michigan winters and should have been aware that ice frequently forms beneath the snow during winter nights. In

Morgan II, supra, our Supreme Court reversed this Court and supported the trial court's view that there is, in Michigan, a general knowledge in that, where there is snow, there is ice. Given that general knowledge and the fact that the snow was clearly visible to plaintiff, the hazards presented by the ice underneath that snow were open and obvious as a matter of law.

Plaintiff's second issue on appeal is whether, even if the ice was open and obvious, special circumstances exist which would subject defendant to liability. Even if a condition is an open and obvious danger, special aspects of the condition may give rise to a uniquely high likelihood of harm or severity of harm and require that the owner of the premises undertake reasonable precautions. *Lugo, supra* at 519. In *Lugo*, the Michigan Supreme Court gave two examples of such special aspects. The first example of a special aspect, and the one that plaintiff argues exists in this case, was a commercial building with only one exit for the general public where the floor is covered with standing water. *Lugo, supra* at 518. Such a condition constitutes a special aspect because it is effectively unavoidable since a customer wishing to exit the store must leave through the water. *Lugo, supra* at 518.

In this case, the ice was not effectively unavoidable. Plaintiff avoided the ice when dropping his keys off and he could have taken the same path back to his fiancée's car. Plaintiff could have chosen to drop his car off at another time. He was not trapped in a building like the person in the *Lugo* example. Plaintiff also could have avoided the ice by having his fiancée drive to where he was standing. Because alternatives to encountering the ice existed, we conclude that the ice was not effectively avoidable and that it does not constitute a special aspect giving rise to liability.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald